

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

2:10-CV-1494 JCM (RJJ)

SIE ERVINE,

Plaintiff,

v.

DESERT VIEW REGIONAL
MEDICAL CENTER HOLDINGS
LLC., et al.,

Defendants.

ORDER

Presently before the court is plaintiff's motion for leave to amend pursuant to Federal Rule of Civil Procedure 15(a). (Doc. #42). Defendants Georges Tannoury, Malin Kerry, Kerry Malin, and Specialty Medical Center have responded (doc. #44), as has defendant Desert View Regional Medical Center Holdings, LLC (doc. #45). Plaintiff has replied. (Doc. #46).

Under Federal Rule of Civil Procedure 15, a plaintiff may, without leave of court, amend his complaint once within 21 days of service so long as the defendant has not filed an answer. Here, plaintiff filed the complaint on September 1, 2010, (doc. #1), and the defendants have already filed an answer (docs. #11, 12, 13). Accordingly, plaintiff properly requested leave to file a first amended complaint.

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." The local rules of federal practice in the District of Nevada qualify this rule, and require that a plaintiff submit a proposed, amended complaint along with a motion to

1 amend. LR 15-1(a).

2 Plaintiff has complied with the rule and filed a proposed amended complaint, which adds a
3 claim alleging retaliation under the Americans with Disabilities Act (Doc. #43). As grounds for this
4 new claim, plaintiff cites a sentence from the defendants' reply in support of the motion for summary
5 judgment (doc. #36), which stated that the plaintiff would be prevented from seeking medical
6 services from Specialty Medical Clinic because he had filed a civil rights lawsuit against it.¹ Plaintiff
7 claims that threatening to refuse services following an attempted enforcement of one's rights under
8 the ADA is per se retaliation.

9 Defendants retort that leave to amend should be denied because the amended complaint
10 would not withstand a motion to dismiss. (Doc. #44). Plaintiffs were never denied medical care by
11 the defendant, nor did Mr. Ervine ever present to Desert View Regional Medical Center for treatment
12 of any kind after filing the complaint. Accordingly, there was never an opportunity for the defendant
13 to tender a wrongful refusal to support a claim of retaliation, and plaintiff's allegation in the
14 amended complaint that he "has been told that he will be refused medical treatment and or services
15 by the Defendants" (doc. #43 at ¶ 68) is simply false.

16 The court agrees with defendant. No employee of the defendant is alleged to have made a
17 retaliatory statement against the plaintiff, and the statement in the reply brief constitutes mere
18 speculation on the part of defendant's counsel. Moreover, statements made by attorneys during the
19 course of judicial proceedings are protected by judicial privilege. *See Circus Circus Hotels, Inc. v.*
20 *Witherspoon*, 657 P.2d 101, 104 (Nev. 1983) (recounting the common law rule that communications
21 expressed in the course of judicial proceedings are absolutely privileged so long as they relate to the
22 subject of the controversy).

23 The policy rationale behind the rule is that the public's interest in promoting free speech in
24 the judicial context "outweighs the risk that individuals will occasionally abuse the privilege...." *Id.*

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26 ¹ The paragraph reads: "Moreover, Mr. Ervine would be prevented from seeking medical
27 treatment from Specialty Medical Center now, as it is doubtful they would provide medical treatment
28 to a patient who is suing them in a federal civil rights lawsuit as there is an obvious conflict of
interest." (Doc. #36 at 4:15–18).

1 Although this rule was established in the defamation context, the court finds it equally applicable
2 to the instant dispute. It is not in the public's interest to allow plaintiffs to create lawsuits out of
3 attorney argument, most notably in light of the fact that this plaintiff has cited no authority
4 demonstrating that a statement made by counsel in a legal brief would constitute a viable basis upon
5 which he may allege a retaliation claim.

6 Accordingly,

7 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's motion to
8 amend (doc. #42) be, and the same hereby is, DENIED. Whereas plaintiff has filed the amended
9 complaint prior to the court's adjudication of this motion, the amended complaint (doc. #43) is
10 hereby ordered STRICKEN.

11 DATED June 28, 2011.

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14 **UNITED STATES DISTRICT JUDGE**